***United States Court of Appeals***

***for the Second Circuit***


# APPELLANT'S BRIEF

To be Argued By
Jacob D. Zeldes

# 77-1009

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,
Appellee

v.

EDWARD V. MASE,
Appellant

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On Appeal From The United States District Court For The District Of Connecticut, Honorable Jon O. Newman, District Judge

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## BRIEF OF APPELLANT EDWARD V. MASE

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## Questions Presented

1. Did the failure to afford defendant Mase a preliminary hearing because of the Government's unwillingness to permit the examination of the alleged victim, a former paid FBI informant, deprive defendant of his rights to compulsory process, to confront the witnesses against him, to introduce evidence, and to be advised of exculpatory material?

2. After a mistrial was declared because six jurors had been exposed to prejudicial publicity to which the Government had contributed, was retrial barred by the double jeopardy clause of the Fifth Amendment?

3. Was the Sixth Amendment violated when defendant was tried by a jury selected from the Hartford Division, which systematically excluded residents of New Haven County, in which the alleged crime was committed?

4. Is the Consumer Credit Protection Act, 18 U.S.C. §891 et seq., constitutional on its face, and is its application to this defendant within the power of Congress?

5. Was the evidence sufficient to permit the jury to find beyond a reasonable doubt that there was an "extension of credit" within the meaning of 18 U.S.C. §891(1)?

6. Should the testimony of FBI agents who destroyed their notes after preparing formal reports be stricken?

7. Was it error to admit a tape recording of a telephone conversation between the victim and an alleged co-conspirator which occurred after defendant's arrest and which contained highly prejudicial material not pertinent to the charges set forth in the indictment?

8. Did the Court err in refusing to charge the jury that a gambling debt is not a "loan" under 18 U.S.C. §891(1)?

## Statutes Primarily Involved

The Consumer Credit Protection Act, 18 U.S.C. §891 et seq., provides in pertinent part:

> "§891. Definitions and rules of construction
> "For the purposes of this chapter:
> "(1) To extend credit means to make or renew any loan, or to enter into any agreement, tacit or express, whereby the repayment or satisfaction of any debt or claim, whether acknowledged or disputed, valid or invalid, and however arising, may or will be deferred.
>
> * * *
>
> "(4) The repayment of any extension of credit includes the repayment, satisfaction, or discharge in whole or in part of any debt or claim, acknowledged or disputed, valid or invalid, resulting from or in connection with that extension of credit.

"(5) To collect an extension of credit means to induce in any way any person to make repayment thereof.

* * *

"(7) An extortionate means is any means which involves the use, or an express or implicit threat of use, of violence or other criminal means to cause harm to the person, reputation, or property of any person.

* * *

"§894. Collection of extensions of credit by extortionate means

"(a) Whoever knowingly participates in any way, or conspires to do so, in the use of any extortionate means

(1) to collect or attempt to collect any extension of credit, or

(2) to punish any person for the nonrepayment thereof, shall be fined not more than $10,000 or imprisoned not more than 20 years, or both.

* * *"

## Preliminary Statement Required By Local Rule No. 28(2)

The judgment in this case was entered on December 14, 1976 after a trial in the District of Connecticut before the Honorable Jon O. Newman and a jury. No written opinion was rendered.

## Statement Of The Case

Defendant Edward V. Mase faces a sentence of ten years imprisonment for making verbal threats to collect an extension of credit in violation of 18 U.S.C. §894 (A209).[1] In an indictment filed July 14, 1976, the Government alleged that defendant Mase and co-defendant Edward Gianotti conspired to use extortionate means to collect an extension of credit from one Paul Dwyer (Count One); the indictment also charged that Mase (Count Two) and Gianotti (Count

1. References to the numbered pages of the Joint Appendix are designated "(A...)."

Three) committed the substantive offense of using extortionate means to collect an extension of credit from Dwyer (A19-20). The alleged "extension of credit," as to Counts One and Three, was a gambling debt owed by Dwyer--a former paid FBI informant (A171)--to Gianotti; as to Count Two, the "extensions of credit" were this gambling debt as well as a gambling debt owed by Dwyer to one Edward Papagoda (A24-25).[2] It was not the Government's contention that these gambling debts were themselves extortionate extensions of credit, but rather that Mase and Gianotti conspired to use and did use extortionate means--verbal threats--to collect the debts.

Trial of defendant Mase[3] took place in Hartford on November 8, 9 and 10 before Judge Newman and a jury.[4] The Government's evidence consisted primarily of the testimony of the victim Dwyer and tape recordings of three conversations which occurred on June 22, 1976: a telephone conversation between Mase and Dwyer (A49), a conversation between Mase and Dwyer at Dwyer's residence (A50-53), and a telephone conversation between Gianotti and Dwyer (A54-62). In summary, it was the Government's claim that Dwyer owed gambling debts to Gianotti

2. Papagoda was named neither as a defendant nor a co-conspirator. He did not testify at trial.
3. A motion to sever filed by Gianotti was granted by agreement (A3); Gianotti subsequently changed his plea to guilty on one count, and was sentenced to a term of six months imprisonment and a period of probation. He did not testify at trial.
4. Extensive proceedings occurred prior to trial, which give rise to several of defendant's claims on appeal. The details of these proceedings are set forth in conjunction with the argument of these claims.

and Papagoda, and that defendant Mase attempted to collect the debts by threatening Dwyer with harm. Defendant Mase offered no evidence. The jury returned a verdict of guilty on Count Two but was unable to reach a verdict on Count One, as to which a mistrial was declared (A6).[5]

On December 14, 1976, Judge Newman ordered defendant Mase

> "...committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of ten (10) years on Count Two." (A209).

Bond pending appeal was denied (A7), and defendant is presently incarcerated.

Before this Court, defendant Mase raises claims regarding the conduct of pre-trial proceedings, the constitutionality of the statute pursuant to which he was convicted, the sufficiency of the Government's proof on an essential element of the offense, certain evidentiary rulings, and the Court's charge.

## Argument

### I. THE FAILURE TO AFFORD DEFENDANT MASE A PRELIMINARY EXAMINATION DEPRIVED HIM OF HIS RIGHTS TO COMPULSORY PROCESS, TO CONFRONT THE WITNESSES AGAINST HIM, TO INTRODUCE EVIDENCE, AND TO BE ADVISED OF EXCULPATORY MATERIAL.

Defendant Mase was arrested without a warrant on June 22, 1976. The next day the Government filed a complaint against him and he was presented before Magistrate Arthur Latimer. Pursuant to Rules 5 and 5.1, F.R.Cr.P., a preliminary hearing to determine probable cause was scheduled for July 12. On that date, defendant appeared before the Magistrate with counsel. Paul Dwyer, the alleged victim, was also present at the courthouse pursuant to a subpoena duces tecum

5. Count One was subsequently dismissed.

issued by defendant (A15). Because the Government did not wish to subject Dwyer to examination by defendant, it declined to proceed with the preliminary examination (A9-13). Defendant thereupon attempted to call Dwyer to testify (A13), but the Government's objection was sustained (A16) and the complaint dismissed (A17-18). Two days later, defendant was indicted.

In a pre-trial motion to dismiss the indictment defendant claimed that the procedure at the preliminary hearing was violative of his rights. In response to this claim, the Government filed with the Court certain sealed material which has never been revealed to defendant. In a pre-trial motion for discovery and inspection, defendant requested all exculpatory material pursuant to Brady v. Maryland, 373 U.S. 83 (1963). The Government's disclosure made no mention of any prior cooperation by Dwyer for which he had received compensation (A21-23). At a hearing on September 30, defendant specifically requested that the Government disclose, pursuant to Brady, whether Dwyer had ever been a paid or unpaid informer (A90). The Government objected to answering this inquiry, claiming that it had "already complied with Brady" (A91), and requested that, before the Court rule on the matter, it review the sealed affidavit that had been submitted with respect to the decision not to proceed with the preliminary hearing (A92-93). Upon reviewing the affidavit, the Court ordered the Government to disclose whether Dwyer had received benefits and, if so, what the benefits were (A94). This disclosure revealed that Dwyer had indeed received benefits of $2,100 from the Government between August, 1971 and May, 1974 on account of information provided by him and expenses arising out of his cooperation.

On this record defendant Mase contends that the dismissal of the complaint without affording him an opportunity to examine Dwyer at the preliminary hearing violated his rights, pursuant to the Sixth Amendment and Rule 5.1(a), F.R.Cr.P., to compulsory process, to examine the witnesses against him, and to introduce evidence. Further, because the Government's strategy was apparently[6] motivated by a desire to avoid disclosure of exculpatory material, the refusal to permit defendant to examine Dwyer was also a deprivation of defendant's right to due process of law, as guaranteed by the Fifth Amendment.

There can be no doubt that a defendant at a preliminary hearing is entitled, as a matter of constitutional right, to the assistance of counsel. Coleman v. Alabama, 399 U.S. 1 (1970). If this is to be a meaningful right, counsel must not be precluded from rendering effective assistance. Thus, an accused at a preliminary hearing is

> "...entitled to subpoenas compelling the attendance ...of witnesses whose testimony promises appreciable assistance on the issue of probable cause." Coleman v. Burnett, 477 F.2d 1187, 1205 (D.C. Cir. 1973) (footnote omitted).

Surely the victim of a crime is a witness who falls within this category. United States v. King, 482 F.2d 768, 775 (D.C. Cir. 1973). The denial of a defendant's right to call such a witness

> "...is not only a contravention of Criminal Rule 5.1(a) but also a deprivation which reaches constitutional magnitude by its infringement of the Sixth Amendment's guaranty of effective assistance of counsel at every critical stage of the criminal proceeding." Id. at 775 (footnotes omitted).

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6. To some extent defendant must argue in a vacuum because pertinent material has been placed under seal.

Here, defendant Mase had subpoenaed the alleged victim to testify at the preliminary hearing, but was unable to obtain the witness' testimony by virtue of the Government's determination not to go forward. To be sure, this determination resulted in a dismissal of the complaint, and two days later probable cause was established by the return of an indictment. It cannot be said, though, that a post-hearing indictment ipso facto cures any defects at the preliminary hearing. United States v. King, supra, 485 F.2d at 776; Coleman v. Burnett, supra, 477 F.2d at 1210. If that were so there would be no reason to afford any rights at the hearing in the first place: an indictment is necessary whether or not there is a hearing, and so a defendant indicted after a defective hearing would stand in the same shoes as one indicted after a hearing in which every "t" was crossed and every "i" dotted. The Supreme Court in Coleman v. Alabama, supra, would not have brought the preliminary hearing within the Sixth Amendment's ambit if it did not feel that such a "constitutionalization" of criminal procedure furthered substantial ends--that is, if it did not feel that there are important differences between preliminary hearings conducted with and without counsel. Indeed, some of those differences were explicitly set forth by the Court: the skills of counsel would be useful to point out weaknesses in the prosecution's case, "fashion a vital impeachment tool," preserve favorable testimony, "discover the case" against the defendant, and make arguments on matters such as bail; the uncounseled defendant, however, would be unable "on his own to realize these advantages...." 399 U.S. at 9. Where these rights are thwarted, relief is warranted despite a subsequent indictment.

By refusing at the last minute to go forward at the preliminary hearing, the Government frustrated defendant Mase's right to examine Dwyer and thereby "fashion a vital impeachment tool" and "discover the case" against defendant. While these benefits are not themselves purposes of the preliminary hearing, Sciortino v. Zampano, 385 F.2d 132 (2 Cir. 1967), cert. denied, 390 U.S. 906 (1968),[7] they are nonetheless valuable by-products of that proceeding that inure to a defendant's advantage, Coleman v. Burnett, supra, 477 F.2d at 1208, and were deemed worthy of constitutional protection in Coleman v. Alabama. Their denial here warrants reversal.

Even if this Court rejects defendant's position up to this point, there is an additional factor in this case that distinguishes it from other preliminary hearing cases and mandates reversal: Here, the Government's apparent motivation in aborting the preliminary hearing was the suppression of Brady material. The same sealed affidavit was submitted to Judge Newman to justify both the termination of the preliminary hearing and the objection to disclosing Dwyer's status as an informant. Although defendant has no idea of what that affidavit says, the inference seems clear that the Government did not want to go forward at the preliminary hearing because it did not want defendant to learn about Dwyer's prior role as an

7. Sciortino, it should be noted, was decided prior to Coleman v. Alabama.

informant.[8] That information, however, was Brady material, see Giglio v. United States, 405 U.S. 150 (1972), and Judge Newman so ruled. Even if the thwarting of defendant's opportunity to discover the Government's case at the preliminary hearing is not deemed reversible error, surely where the discovery that was thwarted was discovery of Brady material--material that the Government is obliged to disclose in any event--a different result should obtain. Just as the Government cannot refuse to disclose the names of witnesses whose testimony would be exculpatory on account of an agreement with them that they will not have to testify, United States v. Fernandez, 506 F.2d 1200 (2 Cir. 1974), neither may it refuse to permit examination of a witness in order to prevent him from divulging exculpatory information regarding his status as a paid informant. Since that is what the Government did here, the conviction cannot stand.

8. Before the Magistrate, the Government stated that it was not proceeding "because of the concern it has with respect to the victim in this case" (A10), and that it did not even want Dwyer in the courtroom because it was "concerned that his sitting in Court may raise some concern because the defendant is also here" (A14). If it is the Government's claim that it decided not to proceed because of fear for Dwyer's safety, that contention defies logic. There is no question but that defendant knew who his accuser was; surely any danger that Dwyer may have faced would not have been increased by virtue of his testimony or presence at the preliminary hearing.

II. THE TRIAL OF DEFENDANT MASE BEFORE A JURY SELECTED FROM THE HARTFORD DIVISION, AFTER A MISTRIAL HAD BEEN DECLARED ON ACCOUNT OF THE EXPOSURE OF A NEW HAVEN DIVISION JURY TO PREJUDICIAL PUBLICITY CONTRIBUTED TO BY THE GOVERNMENT, DEPRIVED DEFENDANT MASE OF HIS RIGHT NOT TO BE TWICE PUT IN JEOPARDY AND OF HIS RIGHT TO TRIAL BY A JURY FROM WHICH NO DISTINCTIVE GROUP IN THE COMMUNITY HAD BEEN SYSTEMATICALLY EXCLUDED.

A. The Factual And Procedural Background.

Defendant Mase was indicted on July 14, 1976 by a grand jury in New Haven. That morning, the New Haven Journal-Courier carried a front page story by Andrew L. Houlding headlined, "Indictment Due Today" (A37). The article reported the comments of the United States Attorney that the initial complaint against defendant had been dismissed "on technical grounds" and that the grand jury was expected to indict defendant, characterized defendant as "involved in organized criminal activities," and recited his criminal record. A similar article appeared in that evening's edition of the New Haven Register (A38). The next day, the Register reported that the indictment had been returned, and characterized it as "only the start of what federal officials say is broad probe of racketeering in the New Haven area" (A39). Again, defendant's criminal record was set forth, and he was branded "a significant 'organized crime' figure in this area." On September 1, after the Government had filed a list of witnesses (A22), the Journal-Courier, in another front page article by Houlding, reported that the name of one Charles DeMartin, "reputed organized crime boss in the New Haven area," was on the list (A40).[9] The article went on to state:

9. DeMartin, in fact, was not called to testify. Indeed, no evidence was introduced by the Government at trial tending to show that defendant was involved in "organized crime" or that he was a member of any "syndicate."

"Sources indicate that DeMartin -- who was not expected to testify voluntarily -- might be given 'use immunity' and compelled to testify or face contempt of court proceedings....Federal investigative sources claim Mase and Gianotti hold subordinate positions to DeMartin's in the New Haven-Bridgeport area syndicate."

As a result of these published reports and others,[10] defendant moved on September 2 that the indictment be dismissed on the ground, inter alia, that the conscious generation of prejudicial pretrial publicity by the Government had deprived him of his right to a fair trial (A31-32). A hearing on the motion was set down for September 30; in the meantime, a jury was selected on September 27, and October 5 was scheduled for the commencement of evidence.

At the September 30 hearing,[10a] defendant attempted to elicit testimony from the reporter Houlding to determine the extent to which officials of the federal government had generated prejudicial publicity (A64-89). Houlding admitted that the United States Attorney had told him that the indictment was expected (A65), that the complaint before the Magistrate had been dismissed on technical grounds (A75-76), and that the dismissal, which had come about because the Strike Force Attorney had not been prepared to proceed, would have no effect on the continuing investigation of defendant (A76-77). However, the witness declined to say whether any government official had told him defendant was connected with organized crime (A69-75, 80-81), who it was who told him that grand jury witnesses had invoked their Fifth

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10. See Volume I to the Record on Appeal.

10a. In order to keep publicity--which was already extensive -- to a minimum, defendant moved that the preliminary proceedings be conducted at closed hearings (A95-96), but his request was denied without reason.

Amendment privilege, (A76),[11] or who was the source of the report, in connection with defendant's indictment, that federal authorities hoped "to make further inroads into alleged organized crime activities in the greater New Haven area" (A77-78). Judge Newman excused the witness without ruling on whether he would be compelled to answer the questions (A88-89). On October 5, the date scheduled for the commencement of evidence, Judge Newman ruled that the witness would not be compelled to answer (A114), denied defendant's request to put certain additional questions to the witness (A106-107), and denied the motion to dismiss (A108-117).

Between the selection of a jury on September 27 and the scheduled commencement of evidence on October 5, co-defendant Edward Gianotti changed his plea on Count Three to guilty, and Count One was dismissed as to him. Notwithstanding defendant's claims of excessive publicity, neither the Government nor the Court took any steps to shield defendant from the impact of Gianotti's change of plea. Again, the New Haven press afforded the matter front page coverage, and the articles referred to defendant Mase as a "member of the New Haven area organized crime syndicate" (A100, 102) and as "reportedly [having] organized crime connections" (A103). On October 5, after the jury was sworn (A118), Judge Newman inquired whether any of the jurors had read anything about the case in the newspaper; six jurors raised their hands (A118-119). These jurors were then questioned individually (A120-127). One said that he had seen a headline about an extortion case, but he stopped reading immediately when he realized that it was the case on which he was sitting (A125); two jurors read that Gianotti, Mase's co-defendant, had changed his plea to guilty (A120, 123); two said they

11. The witness subsequently admitted, in response to a question put by Judge Newman, that "[o]n that particular point" his sources did not include government officials (A86-87).

had read that defendant was "associated with organized crime" (A121) and "supposed to be involved in some, say, syndicate" (A124); and one said that he remembered reading

> "...that Mr. Mase had pleaded guilty to trying to collect money from Paul Dwyer and he was a member of organized crime." (A126).

Upon these admissions by the jurors of their exposure to prejudicial publicity,[12] defendant's motion to dismiss was denied (A129), defendant's motion for mistrial was granted (A130), and the matter was reassigned for trial in Hartford on November 8 (A131).

When the case came on for trial in Hartford, defendant claimed that trial before a second jury would violate his rights under the double jeopardy clause, and that a jury selected from the Hartford Division would systematically exclude residents of the area where the crime was committed. Judge Newman initially offered to commence the trial the next morning in New Haven (A142), and defendant accepted the offer (A143). After a recess, however, the offer was withdrawn (A144) and the trial proceeded at Hartford. Judge Newman indicated that one reason he was withdrawing the offer to return to New Haven was that the array coming in to New Haven the next morning included a significant overlap with the array from which the original jury had been selected (A145).

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12. The testimony indicates that there may have been even more exposure than was admitted. One juror said he had mentioned the article he had seen to another juror, who said she had seen it also; assuming this testimony to be true, the other participant to the conversation did not own up to the fact.

B. Because The Mistrial Was Necessitated By The Overreaching Of The Government And The Action Of The Court, Retrial Was Precluded By The Double Jeopardy Clause.

In Bando v. United States, 244 F.2d 833, 837-38 (2 Cir.), cert. denied, 355 U.S. 844 (1957), this Court admonished:

> "We again stress the obligation that rests upon all law enforcement agencies to avoid making any public statement concerning the progress of the investigation of a crime or the proof already obtained as to the complicity of any person who is either a defendant or likely to be prosecuted for the crime."

In clear disregard of this Court's command, the Government announced the expected action of the grand jury before the indictment was returned. This announcement triggered widespread publicity in the New Haven press--publicity which ultimately reached and tainted a jury duly selected and sworn. Why this case received such an inordinate amount of publicity is unclear, but that lack of clarity is due largely to the restrictions imposed by the District Court on the questioning of the reporter Houlding. The content of the publicity itself, however, indicates that the interest of the press in this case was aroused by its impression of defendant as a significant "organized crime" figure. From its very inception the publicity characterized defendant as being involved with "organized crime," and it was this characterization that ultimately tainted the jury.[13]

13. Defendant recognizes that, in granting a mistrial, Judge Newman stated that he was doing so only because the jurors had learned of Gianotti's change of plea, which one juror misinterpreted to be a plea of guilty by defendant Mase himself (A130). However, the fact that Judge Newman declined to base his ruling on the "organized crime" label which several jurors had attached to defendant cannot make their exposure to that label, or the obvious prejudice that would result, disappear. See United States v. Love, 534 F.2d 87 (6 Cir. 1976) (per curiam).

The extent to which the Government planted this characterization in the reporter's mind is again unclear on account of the Court's refusal to compel Houlding to say whether any federal official had so described defendant to him.[14] The articles themselves, though, attribute several prejudicial characterizations of defendant--for example, that he held "a subordinate positio[n] to DeMartin's in the New Haven-Bridgeport area syndicate" (A40)--to unnamed federal sources. It is clear, therefore, that the initial publicity was ignited by the Government, and that, if the Government did not actually fan the flames of prejudice through reference to defendant as an organized crime figure, neither it nor the Court did anything to quench the fire. Given the Government's unchecked role in generating the prejudicial publicity that ultimately reached the jury, the ensuing mistrial must be deemed necessitated by the Government's overreaching, thus barring retrial under the double jeopardy clause. Reversal of the conviction and dismissal of the indictment are thus mandated.

The mistrial in this case occured after the jury had been sworn--that is, after jeopardy had attached. Serfass v. United States, 420 U.S. 377, 388 (1975). Although the mistrial was at defendant's request--made only after a motion to dismiss was denied--that request

14. To be sure, Houlding testified that he had found in his newspaper's "morgue" some articles dating back to 1972 characterizing defendant as a member of organized crime (A78-79). However, the record does not support an inference that Houlding became interested in defendant's case because he happened to look up these articles in the morgue any more than it supports an inference that Houlding researched defendant in the morgue because his curiosity had been piqued when federal officials told him that defendant was a member of organized crime. If anything, the latter inference seems more compelling. Again, the record is incomplete because of the restrictions placed on the examination of the witness.

was necessitated by the publicity to which the Government had contributed. Defendant's motion for mistrial, therefore, prompted as it was by "prosecutorial...overreaching," United States v. Jorn, 400 U.S. 470, 485 (1971), does not preclude the invocation of the double jeopardy clause:

> "If 'prosecutorial overreaching' is found, a second trial is barred by the Double Jeopardy Clause notwithstanding the fact that the defendan[t] requested the mistrial." United States v. Kessler, 530 F.2d 1246, 1256 (5 Cir. 1976).

In Kessler, a prosecution for conspiracy and attempt to export military explosives, the hearsay declarations of one Fernandez were admitted into evidence subject to later proof that Fernandez was a co-conspirator. On the foundation of these hearsay declarations an AR-180 rifle was admitted as an exhibit, as an example of the arms supposedly involved in the conspiracy. In fact, Fernandez was not acting in furtherance of the conspiracy at the time of the statements, and the Government knew it. The Government also knew that the rifle had no known nexus with the conspiracy. When the Government's proof failed to establish Fernandez' status as a conspirator, a mistrial was declared, on motion of the defendants. The trial judge subsequently dismissed the indictment pursuant to the double jeopardy clause, and the Court of Appeals affirmed, holding that the mistrial had been occasioned by "prosecutorial overreaching." It defined that term as follows:

> "To find 'prosecutorial overreaching,' the Government must have, through 'gross negligence or intentional misconduct,' caused aggravated circumstances to develop which 'seriously prejudice[d] a defendant' causing him to 'reasonably conclude that a continuation of the tainted proceeding would result in a

conviction.'" 530 F.2d at 1256 (footnote and citation omitted).

The record in this case demonstrates that here, too, the mistrial was occasioned by "prosecutorial overreaching."[15] This Court[16] and others[17] have recognized the Government's duty to avoid the generation of publicity. In contravention of that duty the Government triggered inordinate publicity that ultimately infected the jury, depriving defendant of his "valued right to have his trial completed by the particular tribunal summoned to sit in judgment on him." Downum v. United States, 372 U.S. 734, 736 (1963). At best, this constitutes "gross negligence"; at worst, in view of this Court's express admonition in Bando and of the obviously prejudicial nature of the "organized crime" label, United States v. Love, 534 F.2d 87 (6 Cir. 1976)(per curiam), it is "intentional misconduct." In either event, it caused aggravated circumstances to develop causing defendant reasonably to conclude that a continuation of the tainted proceeding would result in a conviction. The Government's conduct here thus

15. If this Court disagrees with defendant's claim that the record is sufficient on this point, then at the very least the matter should be remanded to the District Court for further examination of the witness Houlding to determine the Government's role in generating the publicity.

16. United States v. Grassia, 354 F.2d 27, 29 (2 Cir. 1965), vacated on other grounds, 390 U.S. 202 (1968); United States v. Agueci, 310 F.2d 817, 832 (2 Cir. 1962), cert. denied, 372 U.S. 959 (1963); United States v. Bando, supra, 244 F.2d at 837-38.

17. United States v. Coast of Maine Lobster Co., 538 F.2d 899, 901 (1 Cir. 1976); Henslee v. United States, 246 F.2d 190, 193 (5 Cir. 1957), cert. denied, 359 U.S. 984 (1959); United States v. Mandel, 415 F.Supp. 1033, 1064 (D.Md. 1976); United States v. Sweig, 316 F.Supp. 1148, 1153-54 (S.D.N.Y. 1970).

meets the Kessler standard of "prosecutorial overreaching,"[18] mandating reversal of the conviction and dismissal of the indictment.

C. Trial By A Jury Selected From The Hartford Division Deprived Defendant Mase Of His Right To Trial By A Jury From Which No Distinctive Group In The Community Had Been Systematically Excluded.

Under the Jury Selection Plan for the District of Connecticut, jurors for the Hartford seat of court are selected from the Hartford Division,[19] which does not include New Haven County. New Haven County residents are, however, within the New Haven Division, from which jurors for the New Haven seat of court are selected. The alleged offense in this case occurred in New Haven County. Defendant Mase contends that the trial of this case in Hartford, over his objection, deprived him of his right to a jury selected without systematic exclusion of residents of the place of the alleged crime.[20]

18. In Dinitz v. United States, ___ U.S. ___, 47 L.Ed. 2d 267, 276 (1976), the Supreme Court spoke in terms of "bad faith" conduct rather than "overreaching." However, the Court cited United States v. Jorn, supra, 400 U.S. at 485 for the bad faith test, and that very page in Jorn is also the source not only of the "overreaching" standard, but of a reference to "impropriety" as well. Id., n. 12. The terminology appears to be a question of semantics, however, and the Fifth Circuit's post-Dinitz explication, in Kessler, of its understanding of "overreaching" no doubt includes "bad faith" and "impropriety" as well.

19. The District of Connecticut, of course, is not divided by statute into divisions. United States v. Wilson, 368 F.2d 842, 843 (2 Cir. 1966)(per curiam). The reference here to "divisions" is for purposes of the District's Jury Selection Plan. 28 U.S.C. §1869(e)(2); see United States v. Florence, 456 F.2d 46, 48 & n.* (4 Cir. 1972).

20. Defendant, relying on Dupoint v. United States, 388 F.2d 39 (5 Cir. 1967) also contends that the transfer to Hartford was contrary to Rule 18, F.R.Cr.P., but recognizes that this claim was rejected in United States v. Fernandez, 480 F.2d 726, 730 (2 Cir. 1973). See also United States v. Lewis, 504 F.2d 92, 96-98 (6 Cir.), cert. denied, 421 U.S. 975 (1974); United States v. Addonizio, 451 F.2d 49, 61-62 (3 Cir.), cert. denied, 405 U.S. 936 (1972); United States v. Clark, 416 F.2d 63, 64 (9 Cir. 1969).

What defendant is not claiming in this argument should first be noted. No contention is made here that, as a matter of venue under the Sixth Amendment, defendant was entitled to a trial in New Haven. This is a question that was raised and rejected in United States v. Fernandez, 480 F.2d 726, 730 (2 Cir. 1973). Nor is defendant urging this Court to adopt the position rejected in Zicarelli v. Gray, 543 F.2d 466 (3 Cir. 1976)(en banc), that there is a Sixth Amendment right to trial by a jury composed of residents of the county where the crime was committed; rather, defendant's claim is that which the Third Circuit declined to reach in Zicarelli for lack of exhaustion of state remedies: that the exclusion from the jury selection process of residents of the place of the crime violates the cross-section concept of the Sixth Amendment.[21]

Although this issue was not reached by the en banc Third Circuit in Zicarelli, it was decided by the panel that originally heard the case. Zicarelli v. Gray, 18 Cr.L. 2235 (3 Cir. November 18, 1975). The panel held that residents of different geographical areas within the district are distinctive groups, Thiel v. Southern Pacific Co.,

21. This point was not before this Court in Fernandez, nor could it have been. The crime in that case took place on Kissena Boulevard in Queens, see United States v. Fernandez, 506 F.2d 1200, 1201 (2 Cir. 1974), and the defendant complained about a transfer of the place of trial from Cadman Plaza in Brooklyn to Westbury. It appeared from the testimony in the District Court that jurors would have been selected from "the area within two intersecting arcs encompassing towns within 25 miles of both Westbury and Cadman Plaza." 480 F.2d at 732 (emphasis in original; footnote omitted). Examination of a map, however, indicates that Kissena Boulevard in Queens is approximately 15 miles from Westbury and 10 miles from Cadman Plaza; indeed, Westbury and Cadman Plaza are themselves only about 25 miles apart, as the crow flies. Thus, residents of the place of the crime in Fernandez would not have been excluded from a Westbury jury.

328 U.S. 217, 220 (1946), and that the exclusion from the jury selection process of residents of the area where the crime was committed deprived defendants of substantial Sixth Amendment rights. Relying on Peters v. Kiff, 407 U.S. 493, 504 (1972) and Taylor v. Louisiana, 419 U.S. 522, 532 n. 12 (1975),[22] the panel went on to hold that the defendant need not establish the distinctiveness of the residents of the area in which the crime was committed. The panel also found that its result furthered substantial interests in the administration of criminal justice:

> "To exclude the residents of that area which has the closest connection to the crime -- the area in which the crime was committed -- would tend to undercut the sense of community participation and shared responsibility for the enforcement of the criminal laws. Participation by the residents of the area most affected helps to legitimate the criminal process and to preserve public confidence in the integrity of the jury system." 18 Cr.L. at 2236.

Similarly, in People v. Jones, 9 Cal. 3d 546, 510 P.2d 705 (1973), it was held:

> "...[A] criminal defendant...has a constitutional right to be tried by a jury drawn from, and comprising a representative cross-section of, the residents of the district wherein the crime was committed." 510 P.2d at 709.

In Jones, the crime was committed within the 77th Street Los Angeles Police Department Precinct, which was located within the Central Superior Court District. However, because of crowded conditions in

22. Relying on Taylor, defendant makes a separate challenge to the jury selection process in this case: Defendant's right to a jury selected from a fair cross-section of the community was violated by the fact that the jury qualification questionnaire utilized in the District of Connecticut offers exemptions to women with custody of children under the age of twelve but offers no comparable exemption to men (A36).

the courthouse serving the Central District, all 77th Street Precinct cases were ordered tried in the Southwest Superior Court District. Residents of the 77th Street Precinct were not drawn for jury service in the Southwest District, but rather were drawn to serve exclusively in the Central District. Thus, all residents of the precinct within which the crime was committed were excluded from the group from which defendant's jury was selected. The court held that this procedure violated the mandate of the Sixth Amendment that

> "[t]he district, however large or small, from which the jury is drawn must include the area wherein the crime was committed." 510 P.2d at 711.

The court also held that cultural, sociological and ethnic differences between the place of the crime and the place from which jurors are selected need not be established. Ibid.

Defendant urges this Court to adopt the rationale of the panel in Zicarelli and the California Supreme Court in Jones. Under that rationale, defendant was entitled to trial by a jury from which New Haven County residents were not systematically excluded. Under that rationale, no proof is necessary of differences between the populations of the New Haven and Hartford Districts; in any event, in United States v. Newman, ___ F.2d ___, slip op. 1559 (2 Cir. January 25, 1977), this Court has already recognized that Hartford and Hew Haven juries are not fungible. Under that rationale, the trial of defendant by a jury from which residents of the place of the crime were systematically excluded was contrary to the Sixth Amendment.

III. THE CONSUMER CREDIT PROTECTION ACT, 18 U.S.C. §891 ET SEQ., IS VAGUE AND STANDARDLESS AND VIOLATES FREEDOM OF SPEECH, AND ITS APPLICATION TO THE FACTS OF THIS CASE IS BEYOND THE POWER OF CONGRESS.

A. The Statute Is Vague And Standardless And Violates Freedom Of Speech.

Defendant Mase contends that the inclusion of "implicit threat[s]" within the definition of "extortionate means" in 18 U.S.C. §891(7) renders the statute vague and standardless in that it may sweep entirely innocent acts or communications within its embrace. To that extent, it is also an impermissible infringement on freedom of speech. Recognizing that this Court has already rejected these claims in United States v. DeStafano, 429 F.2d 344, 346-47 & n. 2 (2 Cir. 1970), cert. denied, 402 U.S. 972 (1971), defendant does not press them here, but rather preserves them for further review.

B. The Application Of The Statute To This Case Is Beyond The Power Of Congress.

In Perez v. United States, 402 U.S. 146 (1971), the Supreme Court upheld the Consumer Credit Protection Act, 18 U.S.C. §891 et seq., as a valid exercise of Congress' power under the Commerce Clause. The Court surveyed the Act's legislative history and concluded that Congress quite legitimately found that the activity of loansharking, when viewed in the aggregate on the national level, had a substantial impact on interstate commerce.[23] The activity of loansharking was therefore held to be a fit subject for federal regulation, even though individual loanshark transactions might appear to be wholly intrastate in character. Thus, the Court resolved the "substantial" constitutional question, 402 U.S. at 149, in favor of the statute's validity. It is

23. As Mr. Justice Stewart noted in dissent, this type of reasoning removes all barriers to federal prosecution of local crime, "for all crime is a national problem." 402 U.S. at 157.

crucial to note, however, that the petitioner in Perez was himself a loan shark--a person who loaned money at exorbitant interest rates and used the threat of violence as a collection method--and that the Court carefully limited its decision to the statute "as construed and applied to petitioner." 402 U.S. at 146.

There was no charge in this case that defendant Mase engaged in any loansharking activity. The only allegations against him were that he used extortionate means to collect pre-existing gambling debts owed by Dwyer to Gianotti and Papagoda (A19-20, 24-25). Assuming arguendo that the proof elicited by the Government was sufficient for the jury to find that defendant's conduct fell within the proscription of §894(a),[24] it is defendant's contention that the application of the statute to this case is beyond the power of Congress. The legislative history of the statute, as recounted in Perez, demonstrates a Congressional concern with the impact of loansharking on interstate commerce, and there was an ample basis for Congress to find such an impact. The remedy, however, was far broader than the evil which the statute sought to attack, for the statute extends to areas--such as the present case--having nothing to do with loansharking. There is simply no basis for a conclusion, either by the Congress or the courts, that extortionate attempts to collect extensions of credit in other than a loansharking context, either individually or in the aggregate, have any impact on interstate

24. Defendant challenges this assumption in Part IV of this brief on the ground that the evidence failed to establish the existence of an extension of credit. Defendant does not claim that, as a matter of statutory construction, §894 is limited to organized crime figures or to loan sharks. United States v. Schwartz, ___ F.2d ___, slip op. 1535, 1536-37 (2 Cir. January 25, 1977); United States v. Sears, 544 F.2d 585, 586 (2 Cir. 1976).

commerce. The Commerce Clause is not without its limits, National League of Cities v. Usery, ___ U.S. ___, 49 L.Ed.2d 245 (1976), and considerations of federalism dictate that the criminal laws of the United States should not be extended to "conduct which the Constitution left to the responsibility of the States, merely because Congress wrapped the legislation in the verbal cellophane" of a regulation of interstate commerce. United States v. Kahriger, 345 U.S. 22, 38 (1953)(Frankfurter, J., dissenting).[25]

Defendant recognizes that in Perez Congress' power to regulate a class of activities without requiring proof in each case of an effect on interstate commerce was upheld. That power is not challenged here. Rather, defendant's argument arises from the fact that Congress perceived one class of activities as having an undesirable effect on interstate commerce, and then proceeded to regulate a much broader class of activities. In Perez, the defendant's conduct was within both the class of activities that caused the evil as well as the class of activities regulated by the statute; defendant Mase, on the other hand, may be within the latter class, but he is not within the former. Since there is no basis for a legislative, judicial, or jury finding in this case that defendant's activity is of a kind that has any impact on interstate commerce, the application of §894 to this

25. See also Rewis v. United States, 401 U.S. 808, 812 (1971); United States v. Altese, 542 F.2d 104, 108-09 (2 Cir. 1976) (VanGraafeiland, J., dissenting); United States v. Merolla, 523 F. 2d 51, 55 (2 Cir. 1975); United States v. Archer, 486 F.2d 670, 677-78 (2 Cir. 1973).

case is beyond the power of Congress.[26]

Not only is the application of §894 to defendant substantively unconstitutional under the commerce clause, but it also runs afoul of procedural due process norms. Federal courts are, of course, courts of limited jurisdiction, just as the federal government is a government of limited powers; for a crime to be prosecuted in a federal court, the federal jurisdictional elements of the offense must be present. Under §894, the federal jurisdictional element--the federal nexus--is derived from the fact that Congress has found that a particular class of activities has an impact on interstate commerce. In this case, however, the conduct of defendant does not fall within the class of activities which Congress found to have such an impact. A conviction obtained under such circumstances is akin to a conviction without any evidence on an essential element of the offense, and thus cannot stand. Thompson v. Louisville, 362 U.S. 199 (1960); United States v. Tavoularis, 515 F.2d 1070, 1077 (2 Cir. 1975). Alternatively, the conviction may be viewed as based on a legislative presumption which, for lack of a sufficient basis in fact, fails to meet the standards required for such presumptions. Since the federal nexus is akin to an essential element of the offense, and since that nexus has been established, if at all, only by means of a legislative presumption, the presumed fact (the federal nexus)

26. That Congress is aware of the restrictions on its power to regulate local crime, and in particular local gambling, may be seen from the limitations, in terms of number of people, length of operation, and gross revenue, which it has placed on federal restrictions of illegal gambling businesses. 18 U.S.C. §1955. Another method adopted by Congress to ensure that the commerce clause is not skirted is to require case-by-case proof of interstate effect, as in §1 of the Sherman Act, 15 U.S.C. §1.

must follow from the proved fact (the type of conduct in which defendant engaged) beyond a reasonable doubt. United States v. Tavoularis, supra, 515 F.2d at 1075 n. 11. Here the presumption does not even meet the less stringent "more likely than not" test, let alone the "reasonable doubt" test, and so neither it nor the conviction can stand.

Defendant recognizes that the constitutionality of §894 as applied to cases not involving loansharking or organized crime has been upheld in numerous instances.[27] Of those cases, however, only United States v. Keresty, 465 F.2d 36, 41-43 (3 Cir.), cert. denied, 409 U.S. 991 (1972), addressed the precise issue raised here. Defendant contends that the Third Circuit in Keresty failed to consider the due process implications of its decision, and that its result therefore should not be followed.

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27. United States v. Largent, 545 F.2d 1039, 1042-43 (6 Cir. 1976), cert. denied, ____ U.S. _____, 45 U.S.L.W. 3571 (February 22, 1977); United States v. Schaffer, 539 F.2d 653, 654 (8 Cir. 1976); United States v. Andrino, 501 F.2d 1373, 1377 (9 Cir. 1974); United States v. Annerino, 495 F.2d 1159, 1164-65 (7 Cir. 1974); United States v. Keresty, 465 F.2d 36, 41-43 (3 Cir.), cert. denied, 409 U.S. 991 (1972).

IV. THERE WAS NO EVIDENCE FROM WHICH THE JURY COULD FIND, BEYOND A REASONABLE DOUBT, THAT THERE WAS AN "EXTENSION OF CREDIT" WITHIN THE MEANING OF 18 U.S.C. §891(1).

A. The Papagoda Debt

The Government attempted to prove that one "extension of credit" which defendant Mase attempted to collect from Dwyer was a gambling debt of $985 which Dwyer had owed to Papagoda since 1972 (A24-25). By Dwyer's own testimony on both direct (A154-157) and cross-examination (A174-177), however, this debt had been forgiven. Dwyer did testify that Papagoda had a different claim against him for $3,325 that was separate and distinct from the $985 gambling debt (A176-177). The Government stated that it planned to introduce evidence tending to show that the $985 gambling debt was still outstanding (A159), but such testimony was never forthcoming.[27a] Nor was there any evidence that defendant ever made a demand on Dwyer for a $985 debt to Papagoda. Thus, the alleged Papagoda debt was not a extension of credit which defendant attempted to collect from Dwyer by extortionate means.

B. The Gianotti Debt

The Government also claimed that defendant used extortionate means to collect gambling debts owed by Dwyer to Gianotti. These debts allegedly amounted to approximately $4,000 and were incurred between the 4th and 6th of June, 1976 (A24-25). According to the testimony of Dwyer (A160-164)--the only witness to testify as to the actual incurring of the debts--he had been placing bets with Gianotti and was ahead by about $1,600 prior to June 5, 1976. On that date, he had a conversation with

27a. Because the Government failed to make good on this offer, defendant contends that all evidence that was admitted subject to being connected up was admitted erroneously.

Gianotti during which he wagered approximately $1,800 on baseball games; the result of those bets was a loss of approximately $1,600. On Sunday, June 6, Dwyer had another conversation with Gianotti; he "placed Dark Dash...about five times and...lost approximately $4,000" (A162). Thereafter, Dwyer had no contact with Gianotti until June 8(A163-164). Defendant contends that as a matter of law this evidence fails to demonstrate that an "extension of credit" was incurred between June 4 and June 6, 1976.

To "extend credit" is

> "...to make or renew any loan, or to enter into any agreement...whereby the repayment or satisfaction of any debt or claim...may or will be deferred." 18 U.S.C. §891(1).

Thus, there can be no extension of credit unless there is either (1) a loan or (2) an agreement to defer the repayment or satisfaction of a debt.

Manifestly there was no loan in this case. The statute does not define the term, and so it is to be given its "accepted, understood meaning." Palmer v. United States Civil Service Commission, 191 F.Supp. 495, 537 (S.D. Ill. 1961), reversed on other grounds, 297 F.2d 450 (7 Cir.), cert. denied, 369 U.S. 849 (1962). A loan in its accepted, understood meaning, entails an advance of funds.[28] As this Court once observed:

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28. Bankers Mortgage Co. v. Commissioner of Internal Revenue, 142 F.2d 130, 131 (5 Cir.) cert. denied, 323 U.S. 727 (1944); Holley v. United States, 124 F.2d 909, 911 (6 Cir.) cert. denied, 316 U.S. 685 (1942); Palmer v. United States Civil Service Commission, 191 F.Supp. 495, 537 (S.D. Ill. 1961), reversed on other grounds, 297 F.2d 450 (7 Cir.), cert. denied, 369 U.S. 849 (1962); National Bank of Paulding v. Fidelity & Casualty Co., 131 F.Supp. 121, 123-24 (S.D. Ohio 1954). See Black's Law Dictionary 1085 (Rev. 4th Ed. 1968).

> "A loan of money is a contract by which one delivers a sum of money to another and the latter agrees to return at a future time a sum equivalent to that which he borrows." In re Grand Union Co., 219 F. 353, 356 (2 Cir. 1914), appeal dismissed, 238 U.S. 647 (1915), cert. denied, 238 U.S. 626 (1915).

In this case, there was no delivery of money or advance of funds; there was only the placing of a bet. If the word "loan" is to have any meaning at all--in particular, if it is to have a meaning that differentiates it from an agreement to defer the payment of a debt[29] --it cannot encompass the placing of a bet. Since the only pertinent transaction between Gianotti and Dwyer was the placing of a bet, there was no loan.

Nor was there an agreement to defer the repayment of a debt. Dwyer placed bets with Gianotti on sports events on June 6, prior to the happening of those events. At the time the bets were placed, there was no debt from Dwyer to Gianotti because Dwyer might have won, or the event might have been cancelled. Thus, the placing of the bet itself could not have constituted an agreement to repay a debt, because there was no debt to be repayed. And after the placing of the bet there was no further contact between Dwyer and Gianotti during the period when the "extension of credit" allegedly arose.

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29. There is a distinction between a "loan" and a "credit sale". Acker v. Provident National Bank, 512 F.2d 729, 734-35 (3 Cir. 1975); Stefanski v. Mainway Budget Plan, Inc., 326 F.Supp. 138, 139-40 (S.D. Fla. 1971), reversed on other grounds, 456 F.2d 211 (5 Cir. 1972); Morkirk, Inc. v. Walter E. Heller & Co., 273 F.Supp. 231, 233 (D.S.D. 1967).

Thus, even though a debt from Dwyer to Gianotti may have arisen at the time Dwyer's team lost, there is no evidence of an agreement between Dwyer and Gianotti to defer payment of that debt because there was no contact at all between them. Even though the "agreement" necessary to create an extension of credit may be "tacit", surely there must be some contact between the parties from which such a "tacit agreement" might be inferred. Here, there was none.

Since there was no evidence that there was a loan between Dwyer and Gianotti, and since there was no evidence that between June 4 and June 6 Dwyer and Gianotti entered any agreement, tacit or express, to defer payment of any debt, the alleged "extension of credit" did not exist. Without any evidence on an essential element of the offense, the conviction must be reversed and the indictment dismissed.[30] United States v. Maze, 414 U.S. 395 (1974) (mail fraud conviction reversed for lack of evidence that use of mails was sufficiently related to fraudulent scheme); United States v. Tavoularis, 515 F.2d 1070 (2 Cir. 1975) (conviction under 18 U.S.C. §2113(c) reversed for lack of evidence that defendants, who knew they possessed stolen Treasury bills, knew that the bills had been stolen from a bank).

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30. That the Government was unable to prove an essential element of the offense is reflective of the fact that it chose to bring this prosecution under a statute designed to regulate a type of conduct different from that engaged in by defendant. See Part III, supra.

V. THE COURT ERRED IN NOT STRIKING THE TESTIMONY OF FBI AGENTS WHO HAD DESTROYED THEIR NOTES, IN ADMITTING A TAPE RECORDING OF A POST-CONSPIRACY CONVERSATION BETWEEN A CO-CONSPIRATOR AND THE VICTIM CONTAINING HIGHLY PREJUDICIAL MATERIAL NOT PERTINENT TO THE CHARGES AGAINST DEFENDANT MASE, AND IN REFUSING TO INSTRUCT THE JURY THAT THERE WAS NO LOAN AS A MATTER OF LAW.

A. The Testimony Of FBI Agents Puckett and Slifka Should Have Been Stricken Because They Destroyed Notes Pertaining To Their Investigation Of Defendant Mase.

The Goverment's first two witnesses were FBI agents Robert Puckett and Steven Slifka. Their testimony was preliminary to that of the victim Dwyer; they described how recording devices were attached to Dwyer's telephone and to his body, identified various recordings and transcripts[31], and narrated the events surrounding the making of the recordings. On cross-examination, Puckett stated that he had destroyed notes which he had taken during the investigation of defendant (A146-147). On redirect,

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31. These recordings and transcripts were admitted into evidence as follows:

Exhibit 2: Original recording of telephone conversation between Dwyer and Mase and telephone conversation between Dwyer and Gianotti.

Exhibit 2-A: A duplicate recording of the conversations on Exhibit 2.

Exhibit 2-B: A transcript of the Dwyer-Mase telephone conversation on Exhibit 2 (See A49).

Exhibit 2-C: A transcript of the Dwyer-Gianotti telephone conversation on Exhibit 2 (See A54-62).

Exhibit 3: Original recording of a conversation between Dwyer and Mase.

Exhibit 3-A: A duplicate recording of the conversation on Exhibit 3.

Exhibit 3-B: A transcript of the conversation on Exhibit 3 (See A50-53).

he testified that he destroyed the notes after reducing them to a report on an FBI form 302 (A148). Defendant's motion to strike the agent's testimony (A147, 149) was denied, and the Court's ruling was made applicable to the testimony of other agents (A149). Agent Slifka testified that he had followed the same procedure as did Agent Puckett regarding his notes of the investigation (A151-153).[32] Defendant contends that the destruction of the agents' notes required that their testimony be stricken.

The Jencks Act, 18 U.S.C. §3500, requires that defendants be provided with copies of prior pertinent statements of Government witnesses. Surely an FBI agent's handwritten notes are a "statement" as that term is defined in §3500(e)(1),[33] and thus the question is whether those statements should be preserved for Jencks production. The Ninth and District of Columbia Circuits, as well as the District of Columbia Court of Appeals, have answered that question affirmatively. United States v. Harris, 543 F.2d 1247 (9 Cir. 1976); United States v. Harrison, 524 F.2d 421 (D.C. Cir. 1975); Moore v. United States, 353 A.2d 16 (D.C. App. 1976). The question has been expressly left open by the Supreme Court. Campbell v. United States, 373 U.S. 487, 491 n.5 (1963).

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32. Defendant received copies of the 302 forms prepared by Puckett and Slifka as Jencks material.

33. "The term 'statement'...means...a written statement made by said witness and signed or otherwise adopted or approved by him."

Defendant recognizes that this Court has, in a series of cases, declined to hold that the procedure followed by the FBI agents here was improper.[34] Significantly, however, in one of the first of those cases, United States v. Thomas, 282 F.2d 191, 194 (2 Cir. 1960), this Court observed:

> "In this case [the trial judge] might well have held that these [destroyed] notes [of the F.B.I.'s interview with the witness] did not come within the statute. If so, production would not have been required. On the other hand, he might have found enought therein to warrant production. Borderline situations should be resolved by the trial judges and not by government agents. Hence, it would be the better practice to preserve the written notes taken on interviews with persons accused or suspected of crime." (Emphasis added).

It was the same concept advanced by this Court in Thomas--that the determination of what is and what is not discoverable is a matter for the courts, not the FBI--that prompted the Ninth Circuit, United States v. Harris, supra, 543 F.2d at 1252, and the District of Columbia Circuit, United States v. Harrison, supra, 524 F.2d at 428, to hold that handwritten notes of government agents, even though reduced to a written report, were to be preserved for possible discovery by the defense. Not only might such notes be Jencks material, but they could be discoverable either under Rule 16, F.R.Cr.P., or Brady. Yet by destroying the notes, the FBI preempts

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34. United States v. Terrell, 474 F.2d 872, 877 (2 Cir. 1973); United States v. Covello, 410 F.2d 536, 545 (2 Cir.), cert. denied, 396 U.S. 879 (1969); United States v. Jones, 360 F.2d 92, 95 (2 Cir. 1966), cert. denied, 385 U.S. 1012 (1967); United States v. Comulada, 340 F.2d 449, 450-51 (2 Cir.), cert. denied, 380 U.S. 978 (1965); United States v. Tomaiolo, 317 F.2d 324, 327-28 (2 Cir.), cert. denied, 375 U.S. 856 (1963); United States v. Greco, 298 F.2d 247, 249-50 (2 Cir.), cert. denied, 369 U.S. 820 (1962); United States v. Thomas, 282 F.2d 191, 193-95 (2 Cir. 1960).

the courts from deciding such discovery issues. Moreover, the destruction of the notes makes it impossible for a defendant to show any variance between the notes and the formal report. A matter included by the agent in his notes but omitted from the report because it seemed irrelevant at the time might turn out to be crucial at trial, but with the notes destroyed the defendant is precluded even from seeking a judicial determination of discoverability.

Because the preservation of agents' notes eliminates such problems, defendant contends that this Court should return to the view expressed in Thomas that preservation is the "better practice," and to hold that the destruction of the notes of Agents Puckett and Slifka should have resulted in the striking of their testimony.

B. The Post-Conspiracy Conversation Between Dwyer And Gianotti Contained Highly Prejudicial Material Unrelated To The Charges Against Defendant Mase, And Its Admission Into Evidence Was Erroneous.

The Government's proof tended to show that on June 22, 1976 defendant Mase came to Dwyer's home and engaged in a conversation in which it was claimed Dwyer was threatened with harm for failure to pay his debt to Gianotti. Dwyer had been equipped by the FBI with a body recorder, and a recording was made of the conversation (A50-53). FBI agents were on the premises at the time, and during the conversation defendant happened to open a door and discover Agent Slifka (A53). Shortly thereafter, defendant was placed under arrest. After defendant's arrest, Gianotti telephoned Dwyer's

residence, and his conversation with Dwyer was also recorded.[35] Dwyer told Gianotti that he had not paid defendant; Gianotti said he was worried for Dwyer, and Dwyer attempted to get Gianotti to make a threat of bodily harm. Without responding to Dwyer's invitation, Gianotti suggested that Dwyer call defendant and try either to obtain a loan or to enter an agreement whereby Dwyer would pay five per cent a week on the debt:

"GIANOTTI: Call him and see what, ah see what the hell you could do. I'm trying to think. Oh, boy. The only thing is that if they get a what do you call it for you. You know what I mean?

"DWYER : A who what?

"GIANOTTI: If they get a loan for you?

"DWYER : A loan yeah.

"GIANOTTI: Yeah, they'll, you gotta pay the juice.

"DWYER : Ah, ah, ah, is it a lot of lot of money? The juice.

"GIANOTTI: 20 percent.

"DWYER : 20 percent.

"GIANOTTI: Yeah.

"DWYER : What do I pay that weekly?

"GIANOTTI: Yeah, either they either they can do it two ways. If they can do it at all. You pay 20 percent.

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35. Government Exhibits 3, 3-A and 3-B were tape recordings and a transcript of this conversation. See note 31, supra. A transcript of this conversation is set forth in the Appendix (A54-62). There was also testimony from Dwyer regarding the subject matter of the conversation (A167-171).

"DWYER : That's too much money.

"GIANOTTI: That's what they get.

"DWYER : What's gonna happen to me now then?

"GIANOTTI: Or you pay 5 percent a week.

"DWYER : On the unpaid balance.

"GIANOTTI: No, you pay 5 percent until you ah until you ah pay off the whole thing." (A55).

The discussion of possible refinancing went on for a few more moments, and then Dwyer again[36] brought up the subject of bodily harm, asking a series of questions which Gianotti answered in a manner that could be construed as a threat. Gianotti then changed the subject back to the refinancing, and asked:

"GIANOTTI: Do you go along with that?

"DWYER : Yeah.

"GIANOTTI: But Paul believe me if they do it.

"DWYER : If they do that what? Give me the money?

"GIANOTTI: Give you the money.

"DWYER : Yeah.

"GIANOTTI: Understand.

"DWYER : Yeah.

"GIANOTTI: And if you don't pay the what do you call the juice.

"DWYER : Yeah.

"GIANOTTI: They'll kill you.

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36. This was Dwyer's fourth attempt to evoke a threat.

"DWYER : They'll kill me.

"GIANOTTI: They'll, they'll, they'll break both your arms and legs. Believe me when I say it.

"DWYER : Both my arms and legs. What are you crazy?

"GIANOTTI: That's the way they they don't care." (A58)

Gianotti then reviewed the details of the proposed refinancing alternatives again, making additional references to "juice" (A60-61). Toward the end of the conversation, Gianotti said that if Dwyer failed to pay the existing debt and failed to reach a refinancing agreement, "they're gonna find you and you're gonna get hurt" (A61).

Defendant objected to the admissibility of this conversation, but the Court ruled that insofar as it constituted a verbal act--that is, a threat made to Dwyer by Gianotti, defendant's alleged co-conspirator, to collect the existing debt--it was admissible, but only as to the conspiracy count (A165-166). Judge Newman gave a limiting instruction when the conversation was introduced (A172-173) and again in his charge to the jury (A196-197). Defendant contends that, even if the Gianotti-Dwyer conversation contained verbal acts by Gianotti that were admissible against defendant on Count One, the conversation also contained so much irrelevant material prejudicial to defendant that it should have been excluded, or at least redacted. And even though the jury was unable to reach a verdict on Count One, the potential for prejudice was so great that it cannot be said beyond a reasonable doubt that the conversation did not influence the jury with respect to Count Two, on which defendant was convicted.

The Government attempted to introduce Gianotti's statements in the conversation as declarations of a co-conspirator that would be admissible against defendant for the truth of their contents (A45). However, defendant's arrest terminated his participation in the conspiracy--indeed, since there were only two conspirators, it terminated the conspiracy itself--thus depriving the Government of the benefit of the rule on co-conspirators' declarations. Lutwak v. United States, 344 U.S. 604, 617-18 (1953); United States v. Lam, 544 F.2d 58, 69 (2 Cir. 1976); United States v. Chase, 373 F.2d 453, 459 (4 Cir.), cert. denied, 387 U.S. 907 (1967). Concededly, however, if the conversation contained verbal acts of Gianotti relevant to prove the existence of the conspiracy, evidence of those acts would have been admissible against defendant. Lutwak v. United States, supra; United States v. Bennett, 409 F.2d 888, 893 (2 Cir.), cert. denied, 396 U.S. 852 (1969). But the only conspiracy in which defendant was alleged to have participated was a conspiracy to use extortionate means to collect a gambling debt owed by Dwyer to Gianotti that had been incurred between June 4 and June 6, 1976 (A19-20, 24-25). Thus, assuming the validity of the District Court's premise that the Dwyer-Gianotti conversation contained threats by Gianotti that can be characterized as verbal acts, the only threats relevant to the charges in the indictment are threats made to induce Dwyer to settle the existing debt. A statement that defendant might make a usurious loan to Dwyer to refinance the existing debt is not such a threat, nor is

a statement that if Dwyer made such a loan and failed to pay the "juice" he would be harmed. Although Gianotti did make statements to Dwyer that might be construed as threats relevant to the charges against defendant, the bulk of the conversation related to Gianotti's proposal that Dwyer seek a further extension of credit. And the most serious threat--"They'll kill you"--related not to the existing debt, but to what might happen to Dwyer if he agreed to pay "juice" and then missed a payment. Most of the conversation, therefore, was irrelevant and, if taken for the truth of its contents, inadmissible hearsay.

In United States v. Cianchetti, 315 F.2d 584 (2 Cir. 1963), the jury heard a tape recording which contained certain declarations of defendant Cianchetti, who was claimed by Government to be a conspirator but held not to be by this Court. Included in the conversation were references to another conspirator, Molly Schau, as a "thief," "racketeer," "loafer," "no good," and the cause of her husband's ruination. This Court held that the damaging references were inadmissible hearsay, the prejudicial impact of which was heightened by the "sense of immediacy" that the jurors must have felt when they heard the actual conversation. Id. at 590. Accordingly, Molly Schau's conviction was reversed.

Similarly here, the irrelevant and hearsay declarations of Gianotti were highly prejudicial. He painted a picture of defendant as a usurious lender who would do violence to Dwyer if he did not pay the "juice." The very use of the word "juice" is highly connotative

and prejudicial, smacking of the underworld. See United States v. Love, 534 F.2d 87 (6 Cir. 1976) (per curiam) (improper use of word "Mafia" required reversal). And, as in Cianchetti, the prejudice was heightened by the "sense of immediacy" imparted by permitting the jury to hear Gianotti's words themselves. Here, as in Cianchetti, this evidence

> "might well have painted in especially broad strokes the portrait of [defendant's] apparently unsavory character." 315 F.2d at 590.

It is true that the Court admitted the evidence with a limiting instruction, repeated in the charge. In Cianchetti, however, this Court doubted that a limiting instruction could have cured the error. 315 F.2d at 590. Where the evidence is so prejudicial, judicial reliance on the limiting instruction has been justly recognized as unmitigated fiction:

> "Judge Hand addressed the subject several times. The limiting instruction, he said, is a 'recommendation to the jury of a mental gymnastic which is beyond, not only their powers, but anybody's else,' Nash v. United States, 54 F.2d 1006, 1007; 'Nobody can indeed fail to doubt whether the caution is effective, or whether usually the practical result is not to let in hearsay,' United States v. Gottfried, 165 F.2d 360, 367; 'it is indeed very hard to believe that a jury will, or for that matter can, in practice observe the admonition,' Delli Paoli v. United States, 229 F.2d 319, 321. Judge Hand referred to the instruction as a 'placebo,' medically defined as 'a medicinal lie.' Judge Jerome Frank suggested that its legal equivalent 'is a kind of "judicial lie": It undermines a moral relationship between the courts, the jurors, and the public; like any other judicial deception, it damages the decent judicial administration of justice.' United States v. Grunewald, 233 F.2d 556, 574." Bruton v. United States, 391 U.S. 123, 133 n.8 (1968).

For the same reason, the fact that the jury failed to reach a verdict on the conspiracy count cannot mean that they were

uninfluenced by Gianotti's inadmissible references to defendant in reaching a verdict of guilty on Count Two. Just as the conviction of a defendant in a multiple-conspirator case may be tainted by the "spillover effect" of evidence of the evil doings of other conspirators, United States v. Bertolotti, 529 F.2d 149, 156 (2 Cir. 1975), so too may defendant's conviction on Count Two have been tainted by the "spillover effect" of inadmissible evidence on Count One.

Given the relatively minor part that relevant verbal acts may have played in the Dwyer-Gianotti conversation and the inflammatory nature of the irrelevant material, the District Judge should have held the entire exhibit inadmissible. Alternatively, he should have permitted the jury to hear only those portions of the conversations that contained relevant verbal acts. His refusal to do either requires reversal.

### C. The Court's Refusal To Instruct The Jury That There Was No "Loan" As A Matter Of Law Was Erroneous.

Defendant Mase requested that the Court charge the jury that, as a matter of law, there was no "loan," as that term is used in 18 U.S.C. §891(1) (A135-136).[37] In the main portion of the charge, however, the Court told the jury that, if they found there was a gambling debt, they would be entitled to find an extension of credit (A189). Defendant excepted, preserving his claim that there was no loan as a matter of law and objecting to the Court's apparent equation

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37. As argued as Part IV of this brief, there can be no violation of 18 U.S.C. §894 without an "extension of credit," and there can be no "extension of credit" without a "loan" or an "agreement to defer repayment of a debt." 18 U.S.C. §891(1).

of "gambling debt" with "extension of credit" (A201). The Court gave a supplemental charge explaining the necessity for the jury to find either a loan or an agreement to defer repayment of a debt, but again not charging that there was no loan as a matter of law (A205-206).

For the reasons set forth in Part IV of this brief, defendant Mase contends that as a matter of law there was no "loan," and that the submission of this issue to the jury was reversible error.

## Conclusion

For all these reasons, then, the judgment of the District Court should be--and defendant Mase requests that it be--reversed.

Dated at Bridgeport, Connecticut, this 22 day of March, 1977.

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DOCKET NO. 77-1009

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,
Appellee

v.

EDWARD V. MASE,
Appellant

CERTIFICATE OF SERVICE

I, Jacob D. Zeldes, Counsel to defendant-appellant Edward V. Mase in the above-entitled matter, hereby certify that on the 2d day of March, 1977, I served the attached Brief and Appendix of Appellant Edward V. Mase upon the attorney for the appellee by depositing copies in the U.S. mails, postage prepaid, addressed to him at the following address:

Paul E. Coffey, Esquire
Special Attorney
U.S. Department of Justice
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Hartford, Connecticut 06103

Dated at Bridgeport, Connecticut this 2d day of March, 1977.

Jacob D. Zeldes
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